IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23/06/2003

CORAM

THE HON'BLE MR.JUSTICE P.K. MISHRA
AND
THE HON'BLE MR.JUSTICE F.M. IBRAHIM KALIFULLA

WRIT PETITION NO. 11236 OF 2000

1. C. Chakkaravarthy
2. G. Elanchiezhian
3. S. Parrie
4. R. Suresh
5. G. Rajulu .... Petitioners

-Vs-

1. Union of India rep by the
Government of Pondicherry
rep by Secretary to Government
Local Administration and Public
Works Department
(Public Works Wing),
Pondicherry-1

2. R. Saisubramanian
3. M. Ravisankar
4. B. Palaniappan
5. N. Suresh Nathan
6. G. Vijayan
7. J. Jayakumar
8. R. Sowrirajan
9. The Central Administrative Tribunal
Additional Bench, Madras rep by
its Registrar

10.P. Paramasivam
11.S. Adaikala Lawrance
12.M.R.Velu
13.V. Chinnakunju
14.S. Ramachandran
15.E. Ramadoss
16.S. Sekaran
17.S. Suresh
18.G. Nagarajan
19.Mr. Vaidyanathan
20.J. Kalidasan

21.N. Kanniappan
22.J. Lucian Pedre Kumar
23.R. Ravichandran
24.S. Manikavasagam
25.S. Sridhar
26.R. Manikavasagam

(R.23 to R.26 were impleaded as per
Order dated 16.9.2002 in W.P.M.P.No.
51797 of 2002) .... Respondents

Writ Petition filed under Article 226 of the Constitution of India
praying this Court to issue a Writ of Certiorarified Mandamus calling for the records of the 9th respondent in its Order in O.A.No.359/97 dated 27.8.99,

quash the same and consequently direct the 1st respondent to promote the petitioners as Assistant Engineers in the Public Works Department of the Government of Pondicherry with effect from 8.3.1997 with all benefits.

!For petitioners : Mr.Vijaya Narayan

^For 1st respondent : Mr.T. Murugesan
Govt. Pleader

For respondents 2 to 8 : Mr. Mohan Parasaran
Senior Counsel for
M/s G.R. Swaminathan

For respondents 10 to 22 : Ms.R. Vaigai

For respondents 23 to 26 : Mr.R. Hariharan

:JUDGMENT

(The Judgment of the Court was delivered by P.K. MISRA,J.,)

Heard the learned counsel appearing for the parties. The facts giving rise to present writ petitions are narrated in some detail.

2. The petitioners joined under the first respondent as Section Officers, subsequently re-designated as Junior Engineers. Initially they were diploma holders. The contesting respondents 2 to 8 also joined as Section Officers at a subsequent point of time. They were degree holders at the time of their appointment. As per the Rules, 20% of the posts of Assistant Engineers are to be filled up by Direct Recruitment and the balance by promotion from the Junior Engineers and a Junior Engineer can be promoted to the post of Assistant Engineer. 50% of such promotional posts are reserved for Junior Engineers having degree as their qualification and 50% are reserved for diploma holders. So far as degree holders are concerned, as per Rule 11,

three years in service is required to make a Junior Engineer eligible for promotion as Assistant Engineer, whereas so far as diploma holders are concerned, it is indicated that they must have six years service in such cadre of junior engineer. The petitioner after having joined service as junior engineers subsequently acquired degree. Selection took place in the year 1987 and 1989. At that stage, the petitioners had not completed three years of service after acquiring the degree even though they were already in service for more than three years as diploma holders. As the petitioners' cases were not considered, O.A.No.552/1989 was filed before the Central Administrative Tribunal. It was the contention of the petitioners at th at stage that since they were already in service for more than three years and since they had acquired degree, they were eligible to be considered for promotion and by ignoring their case illegality had been committed. The Central Administrative Tribunal by its judgment dated 9.1.1990 upheld the contention of such applicants and held that since the applicants had three years of experience in service, as soon as they acquired the degree qualification, they became eligible for promotion and their case should have been considered. Accordingly, a direction was given to hold Review D.P.C for the purpose of considering such cases. Such decision of the Tribunal was challenged by the Junior Engineers before the Supreme Court. The Supreme Court by Judgment dated 22.11.1991 in the decision reported in A.I.R. 1992 SC 564 (N. SURESH NATHAN AND ANOTHER VS UNION OF INDIA AND OTHERS) reversed the decision of the Tribunal. Since much reliance has been placed by the contesting respondents, on such decision it is necessary to quote the relevant portions of the decision of the Supreme Court in extenso:
"..... for appointment by promotion of Section Officers now called Junior Engineers, the qualification prescribed is as under

" 1. Section Officers possessing a recognised Degree in Civil Engineering or equivalent with three years' service in the grade failing which Sections Officers holding Diploma in Civil Engineering with six years' service in the grade - 50 per cent.
2.Section Officers possessing a recognised Diploma in Civil Engineering with six years' service in the grade - 50 per cent.

2. The dispute in the present case is whether a Diploma holder Junior Engineer who obtains a Degree while in service becomes eligible for appointment as Assistant Engineer by promotion on completion of three years' service prior to obtaining the Degree or the three years' service as a Degree holder for this purpose is to be reckoned from the date he obtains the Degree. The Diploma holders contend that they are entitled to include the earlier period and would be eligible for promotion in this category on obtaining the Degree if the total period of service is three years inclusive of the earlier period. The Degree holders contest this position and contend to the contrary. According to the Degree-holders, these are two distinct categories. In the first category are Degree holders with three years' service in the grade as degree holders, the period of three years being subsequent to the date of obtaining the degree as in the case of the Junior Engineers who join the service with a Degree and the other category is of Diploma holders with six years' experience.
.....

4. In our opinion, this appeal has to be allowed. There is sufficient material including the admission of respondents Diploma holders that the practice followed in the Department for a long time was that in the case of Diploma holder Junior Engineers who obtained the Degree during service, the period of three years' service in the grade for eligibility for promotion as Degree holders commenced from the date of obtaining the Degree and the earlier period of service as Diploma holders was not counted for this purpose. This earlier practice was clearly admitted by the respondents Diploma holders in para 5 of their application made to the Tribunal at page 115 of the paper book. This also appears to be the view of the Union Public Service Commission contained in their letter dated December 6,1968 extracted at pages 99-100 of the paper book in the counter affidavit of respondents
1 to 3. The real question, therefore, is whether the construction made of this provision in the rules on which the past practice extending over a long period is based is untenable to require upsetting it. If the past practice is based on one of the possible constructions which can be made of the rules then upsetting the same now would not be appropriate. It is in this perspective that the question raised has to be determined.
5. The Recruitment Rules for the post of Assistant Engineers in the P.W.D. (Annexure-C) are at pages 57 to 59 of the paper book Rule 7 lays down the qualifications for direct recruitment from the two sources, namely, Degree holders and Diploma holders with three years' professional experience. In other words, a Degree is equated to Diploma with three years' professional experience. Rule 11 provides for recruitment by promotion from the grade of Section Officers now called Junior Engineers. There also categories provided therein- one is of degree holder Junior Engineers with three years' service in the grade and the other is of Diploma holder Junior Engineers with six years' service in the grade, the provision being for 50% from each category. This matches with R,7 wherein a Degree is equated with Diploma with three years' professional experience. In the first category meant for Degree holders, it is also provided that if degree holders with three years; service in the grade are not available in sufficient number, then Diploma holders with six years' service in the grade may be considered in the category of Degree holders also for the 50% vacancies meant for them. The entire scheme, therefore, does indicate that the period of three years' service in the grade required for Degree holders according to R.11 as the qualification for promotion in that category must mean three years' service in the grade as a Degree holder and therefore, that period of three years can commence only from the date of obtaining the Degree and not earlier. The service in the grade as a Diploma holder prior to obtaining the Degree cannot be counted as service in the grade with a Degree for the purpose of three years' service as a Degree holder. The only question before us is of the construction of the provision and not of the validity thereof and, therefore, we are only required to construe the meaning of the provision. In our opinion, the contention of the appellants Degree holders that the rules must be construed to mean that the three years' service in the grade of a Degree holder for the purpose of R.11 is three years from the date of obtaining the Degree is quite tenable and commends to us being in conformity with the past practice followed consistently. It has also been so understood by all concerned till the raising of the present controversy recently by the respondents. The Tribunal was, therefore, not justified in taking the contrary view and unsettling the settled practice in the

Department."
(emphasis supplied by us)

3. Thereafter, review application had been filed before the Supreme Court, which was dismissed by the Supreme Court, by order dated 13.1.1993 in Review Petition NO.50/93. The entire order is also extracted here under:

ORDER
We have considered the review petition along with Annexures I and II and examined the other relevant documents and we do not find any merit in the prayer for review which is accordingly rejected.

4. As per the said decision of the Supreme Court, there is no dispute that the persons whose promotion at that time had been impugned before C.A.T in O.A.No 552/1989 have been restored in the promoted post. Such persons are not before this Court in the present case and their promotions are not in question.

5. After the aforesaid episode was over, in the subsequent D.P.C for considering the question of promotion to other vacancies, the present respondents 2 to 8 were promoted and the petitioners were not considered for promotion. According to the contesting respondents, this was done in view of the specific decision of the Supreme Court that service rendered as Junior Engineer before acquiring the degree was not to be considered while considering the question of promotion to the post of Assistant Engineer from among the degree holder Junior Engineers.

6. The petitioners filed O.A.No.359/97 before the Central Administrative Tribunal. Such petition was dismissed by the Tribunal, giving rise to the filing of the present writ petition.

7. Mr. Vijay Narayan, the learned counsel for the petitioner has contended that as per the decision of the Supreme Court, a diploma holder if he subsequently acquires a degree would become eligible for promotion only after three years of experience after acquiring the degree in engineering. Once such persons become eligible, the question of promotion has to be considered on the basis of merit cum seniority and the past services of the persons rendered prior to their acquiring the degree cannot be ignored for the purpose of computing the seniority. Such contention has been supported by Ms. R. Vaigai appearing for respondents 10 to 22.

8. On the other hand it is the contention of the learned counsel for the Union Territory of Pondicherry as well as Mr.Mohan Parasaran, the counsel for the respondents 2 to 8 that the length of service of diploma holders prior to the acquiring of the degree of engineering cannot be counted for the purpose of considering the question of promotion, according to the decision of the Supreme Court, which is binding on all concerned.

9. We have already extracted the relevant portion of the decision of the Supreme Court. At the time, when O.A.No.52/89 was filed, admittedly, the present petitioners had not completed three years of service after acquiring

the degree in engineering. The observation of the Supreme Court in the emphasised portion makes it amply clear that the Supreme Court had considered only the question of eligibility of diploma holder who subsequently acquired the degree for promotion to the post of Assistant Engineer.
According to the Supreme Court in Suresh Nathan's case, such persons would become eligible only after completing three years of service after acquiring a degree of engineering. The question as to whether the past service rendered as diploma holder would be counted for the purpose of seniority for promotion was not considered by the Supreme Court and had not risen at that stage. In

other words, the Supreme Court was concerned only with the question of eligibility, but was not concerned as to whether the past services rendered by the diploma holders would be counted for the purpose of seniority.

10. It is not disputed that a person, whether a degree holder or diploma holder, after joining service as junior engineer, is borne in a common cadre and the seniority is considered from the date of joining service irrespective of the educational qualification. Therefore, the services rendered by the diploma holder in junior engineer cadre cannot be ignored while considering his case for promotion, after he acquires the degree of graduation in engi neering. However, in view of Rule 11 as interpreted by the Supreme Court, such a person can become eligible only after rendering three years of service after acquiring the degree in engineering.

11. Even before the ink had dried in Suresh Nathen's case, the Supreme Court in M.B. Joshi vs Satish Kumar Pandey (1993 Supp (2) SCC 419 distinguished the earlier case and observed that the experience prior to the acquisition of the higher qualification cannot be ignored.

12. The matter was again considered in (1994) Supp 1 SCC 95 (Union of India vs B. Jayaram and Others) and the decision in Suresh Nathan' s case was distinguished.

13. The aforesaid decision of the Supreme Court in Suresh Nathan's case was again considered in 1997 (4) SCC 753 (D. Stephen Joseph vs Union of India and Others). Distinguishing Suresh Nathan's case and relying upon M.B. Joshi's case, the Supreme Court observed as follows:
"It appears to us that the State Government is labouring under a wrong impression as to the applicability of the past practice as indicated in Suresh Nathan case. This Court in the said decision, has only indicated that past practice should not be upset provided such practice conforms to the rule for promotion and consistently for some time past the rule has been made applicable in a particular manner. In our view, the decision in Nathan case only indicates that past practice must be referable to the applicability of the rule by interpreting it in a particular manner consistently for some time. Any past practice dehors the rule cannot be taken into consideration as past practice consistently followed for long by interpreting the rule. It may be indicated here that a similar question also came up for consideration before this Court in M.B. Joshi vs Satish Kumar Pandey. The decision in Suresh Nathan case was distinguished in the facts of that case and it was indicated that when the language of the rule is quite specific that if a particular

length of service in the feeder post together with educational qualification enables a candidate to be considered for promotion, it will not be proper to count the experience only from the date of acquisition of superior educational qualification because such interpretation will violate the very purpose to give incentive to the employee to acquire higher education".

14. The question of promotion in a similar situation was directly considered by the Supreme Court in the case of R.B. Desai and Another vs S.K. Khanolker and Others in 1999 7 SCC 54 After considering the rules applicable to that particular case, the Supreme Court observed as follows:
"If on the date of consideration, the appellants did not have the eligibility then certainly it is the first respondent who ought to have been considered for the said promotion and if he was so promoted earlier than the appellants he would have acquired a higher ranking in the seniority list of ACFS. That not being the case, we are unable to agree with the view taken by the High Court, as stated above, because on the date on which the avenue for promotion to the cadre of ACFs opened both the appellants as well as the first respondent had the necessary eligibility and their names figured in the eligibility list. That being so, as stated above, it is the appellants whose case ought to have been considered first and it was so done and they having been found otherwise suitable, they were rightly promoted earlier than the first respondent. Consequently, they are entitled to a higher ranking in the cadre of ACFs vis-a-vis the first respondent. The view taken by us also finds support from the judgment of this Court in Union of India vs B. Jayaraman wherein considering a similar argument this Court held:
" The note in column 11 is only for purposes of giving eligibility to the erstwhile Assistants working as Superintendents Grade II for purposes of being considered for promotion to the post of Superintendent Grade I and not for the purpose of seniority at all"
with which view we respectfully agree"

15. In the case of A.K. Raghumani Singh and Others vs Gopal Chandra Nath and Others reported in (2000(4) SCC 30) the question was again considered and after referring to other decisions viz., M.B. Joshi vs Satish Kumar Pandey, (1993 Supp (2) SCC 419) and D. Stephen Joseph vs Union of India ((1997)4 SCC 753) the Supreme Court reiterated the view that the entire service of a person concerned even before acquiring the degree would be counted for the purpose of seniority and for the purpose of promotion.

16. A perusal of the aforesaid decisions makes it clear that the question of eligibility for promotion is one thing and question of counting entire service after a person becomes eligible is considered on a different footing. As noticed earlier in A.I.R 1992 SC 564 , the Supreme Court was concerned only with the question of eligibility of a diploma holder to be considered for promotion after acquiring degree and it was observed that after acquiring the degree he has to work for three years before he would become eligible.

17. The learned counsel appearing for the respondents 2 to 8 vehemently contended that the question of resjudicata is squarely applicable to the present case and since the very same question has already been decided

between the parties in the earlier decision of the Supreme Court, no contrary contention can be countenanced. Even though such a contention may appear to be attractive on the face of it, on deeper scrutiny, such contention does not appear to be tenable. The question of resjudicata would be applicable where the question was directly in issue. In the earlier case the only question was relating to eligibility and the Supreme Court had observed that the Diploma holder after acquiring the degree would become eligible only after three years of service . At the cost of the repetition, it may be pointed out that at that stage the only question which arose for determination was relating to the eligibility for such diploma holders after they acquired degree.

18. It is seen that in the present case a fresh selection process was started in the year 1996 and the respondents 2 to 8 have been selected on the footing that they had longer service after their graduation. The past services of the petitioners as in the cadre of junior engineers as diploma holders before they become degree holders has not been considered. This has been done on a wrong interpretation of the decision of the Supreme Court in the case of N. Suresh Nathan and Another vs Union of India and others reported in A.I.R 1992 SC 564.

19. The learned counsel appearing for the contesting respondents also contended that subsequent to the aforesaid decision a Review Application had been filed , wherein the question of seniority in the entire service had been raised and therefore, it must be taken that the question has been finalised by the Supreme Court. It is true that the Supreme Court in the Order rejecting the Review Application has referred to Annexure, which had been filed along with the Review Application, but the sole question was of eligibility and with reference to the correspondence made by UPSC, but the question as to whether the entire service is to be counted or not was not pleaded either in the original S.L.P or in the Review Application. As a matter of fact, such question could not have been arisen . It has to be remembered that the Supreme Court considered the question of promotion decided in D.P.C held in the years 1987 and 1989. At that stage, the petitioners had not served for three years after acquiring the degree in Engineering. Since the question had not directly arisen, nor could have been pleaded at that stage, we are of the view that the question of resjudicata either actual or constructive does not arise.

20. The learned counsel for the contesting respondents also raised a contention that in view of Article 141 of the Constitution of India, the Law, as declared by Supreme Court, is binding on all Courts. In the present case, the ratio of the decision of the Supreme Court in AIR 1992 SC 564 has already been clarified by the Supreme Court subsequently by several decisions as already noticed. The view which we have now expressed is in consonance with the ratio of subsequent decisions and in no way contrary to the decision in the case of N. SURESH NATHAN AND ANOTHER VS UNION OF INDIA AND OTHERS reported in A.I.R 1 992 SC 564.

21. The learned Senior Counsel Mr. Mohan Parasaran appearing for the

respondents 2 to 8 relied upon the decision reported in 2001(2) SCC 362(INDIAN AIRLINES LTD VS S. GOPALAKRISHNAN) The afore said decision also was on the question of the eligibility or qualification and the question as to whether the entire service would be counted after the person is found eligible, was not before the Supreme Court and was not considered by the Supreme Court.

22. In view of the above, we are inclined to allow the writ petition and direct that a review D.P.C should be held to consider the question of promotion of the present petitioners vis-a-vis the respondents 2 to 8 and other eligible persons who had become eligible by the date of the sitting of D.P.C held in 1996. It is made clear that the persons who got the benefit of the Supreme Court decision in A.I.R 1992 SC 564 are not before this Court and their promotion is not at all affected by the present order.

23. The learned counsel for the petitioners submitted that in 1991 the Rules had been changed and in the cadre of Junior Engineers. Two grades have been introduced viz., Junior Engineer Grade-II and Junior Engineer Grade-I. It is further submitted that the present petitioners had been promoted to Grade-I earlier to the contesting respondents 2 to 8 and therefore, before promoting respondents 2 to 8, the petitioners should have been promoted. In the meantime, such Rule has been abolished. In view of the fact that we have given a direction for reconsideration of the question of promotion, this question raised by the petitioners need not be decided and we have not expressed any opinion on this aspect.

24. The writ petition is accordingly allowed, subject to the directions given. No costs. Fresh exercise as per our direction shall be carried out within a period of four months from the date of communication of this order.

(P.K. MISRA,J.,) (F.M.I.K.J.,)
23-06-2003
sr

Index:yes
Web site: yes

P.K. MISRA,J.,
AND
F.M. IBRAHIM KALIFULLA,J.,
sr

To
1. The Union of India rep by the
Government of Pondicherry
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